Supreme Court, U.S.
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No. 04-381

IN THE

Supreme Court of the United States

DE SHEN,

Petitioner,

v.

T.D. WATERHOUSE INVESTOR SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Did the United States Court of Appeals for the First Circuit ("First Circuit") err in affirming the judgment of the United States District Court for the District of Massachusetts ("District Court"), in which the District Court confirmed an arbitration award that Petitioner claimed was procured by fraud and should have been vacated under the Federal Arbitration Act, 9 U.S.C. § 10(a)(1) (2004)?

2. Did the First Circuit violate Petitioner's right to free speech under the First Amendment by failing to hold a hearing prior to affirming the District Court's judgment?

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1. Petitioner has proceeded *pro se* throughout these proceedings and continues to do so. The Petition for Writ of Certiorari lists nine (9) questions presented. Many, if not all, of the questions presented by Petitioner are nonsensical and do not warrant this Court's consideration. The questions set forth herein represent Respondent's best summary of the issues presented by Petitioner in his Petition for Writ of Certiorari.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

T.D. Waterhouse Investor Services, Inc. hereby states that it is a wholly-owned subsidiary of T.D. Waterhouse Group, Inc., which is itself a wholly-owned subsidiary of The Toronto Dominion Bank, a public company.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE FIRST CIRCUIT[2]

1. Petitioner, Delvin DeShen

2. Respondent, T. D. Waterhouse Investor Services, Inc.

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2. The Petition for Writ of Certiorari incorrectly lists the judges of the First Circuit, the District Court judge, and employees of the National Association of Securities Dealers, Inc. ("NASD") as parties to the proceedings in the First Circuit.

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CITATIONS OF THE UNOFFICIAL REPORTS OF THE OPINIONS BELOW[3]

DeShen v. T.D. Waterhouse Investor Services, Inc., No. 00-11190-WGY (D. Mass. Feb. 27, 2003).

DeShen v. T.D. Waterhouse Investor Services, Inc., Nos. 03-1415, 03-1478 (1st Cir. Feb. 5, 2004).

JURISDICTIONAL STATEMENT[4]

Jurisdiction is proper pursuant to 28 U.S.C. § 1254 (2004). The United States Court of Appeals for the First Circuit entered judgment on February 5, 2004, which was certified and issued as mandate on April 13, 2004. Petitioner filed his Petition for Writ of Certiorari on June 20, 2004.

THE STATUTE INVOLVED IN THE CASE[5]

9 U.S.C. § 10 (2004)

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was

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3. The Petition for Writ of Certiorari quotes the judgment of the First Circuit instead of citing to the unofficial reports of the opinions below.

4. The Petition for Writ of Certiorari incorrectly lists the "Bill of Rights, Executive Order 13271 of July 9, 2002, Federal Arbitration Act, and 15 U.S.C.A. §78a" in the jurisdictional statement.

5. The Petition for Writ of Certiorari incorrectly includes the Bill of Rights, "all people are created equal," and "people should have the right of the freedom of speech" as statutes involved in the case.

made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

INTRODUCTION[6]

Petitioner seeks to have this Court review a First Circuit judgment affirming a judgment by the District Court in which the District Court confirmed an arbitration award. Petitioner contends that the underlying arbitration award was procured by fraud and should have been vacated pursuant to § 10(a)(1) of the Federal Arbitration Act ("FAA"). Petitioner further contends that the First Circuit violated his right to free speech under the First Amendment by failing to conduct a hearing prior to ruling on his appeal.

Petitioner, however, has set forth no compelling reason for the Court to grant certiorari in this case. Petitioner has not alleged that the First Circuit's judgment makes new law or that it conflicts with a decision of this Court or with another Court of Appeals. Rather, Petitioner merely seeks to have this Court revisit arguments that have been considered and rejected by both the District Court and the First Circuit.

Petitioner asserts that the arbitration award should have been vacated under § 10(a)(1) of the FAA due to alleged (i) "fraud on violating the rules of the arbitration panel selection"; and alleged (ii) "fraud on modifying arbitration hearing tape." (Pet. at 12.)[7] Both the District Court and the

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6. The Petition for Writ of Certiorari fails to present the Court with accuracy, brevity, and clarity those arguments that are essential to ready and adequate understanding of the points requiring consideration. Pursuant to United States Supreme Court Rule 14(4), Petitioner's failure in this regard constitutes sufficient grounds to deny the petition.

7. References to the Petition for Writ of Certiorari are cited as "Pet. at__."

First Circuit have passed on these issues, however, implicitly finding that Petitioner did not satisfy his burden of establishing by clear and convincing evidence that the arbitration award was procured by fraud or of demonstrating that the purported frauds materially related to an issue in arbitration.

There is no compelling reason for the Court to review the First Circuit's decision. In fact, further review by this Court of Petitioner's fraud arguments would serve only to thwart the Congressional purpose of encouraging speedy resolution of arbitration disputes and to undermine the broad federal policy favoring the finality of arbitration awards.

Moreover, the First Circuit did not err in affirming the District Court judgment denying Petitioner's motion to vacate. The District Court correctly determined that Petitioner did not demonstrate by clear and convincing evidence that the arbitration award was procured by fraud or that the alleged fraud materially related to an issue in arbitration.

Finally, Petitioner's unsupported assertion that the First Circuit violated his First Amendment right to free speech is not sufficiently significant to warrant this Court's review. The First Amendment does not guarantee a right to a hearing on an appeal of a district court's judgment confirming an arbitration award. It is within the First Circuit's discretion as to whether or not to hold a hearing. The First Circuit did not violate Petitioner's right to free speech.

STATEMENT OF THE CASE

Petitioner De Shen (hereinafter "Petitioner") filed a complaint for "trade fraud" against Respondent T.D. Waterhouse Investor Services, Inc. (hereinafter "Respondent") in the District of Massachusetts on June 4, 2000. (P.C. Supp. App. 6.)[8] The underlying causes of action asserted by Petitioner involved allegations that Respondent failed to execute a trade of 5000 shares of Peritus Software Services, Inc. (P.C. Supp. App. 6.) Respondent moved the District Court to compel arbitration and stay litigation on July 12, 2000. The District Court ordered that the case proceed to arbitration and stayed the federal court litigation on July 17, 2000. (P.C. Supp. App. 14.)

Petitioner filed a Statement of Claim in arbitration on August 23, 2001 with the National Association of Securities Dealers, Inc. ("NASD"). (P.C. Supp. App. 39.) Respondent filed its Statement of Answer with the NASD on November 7, 2001. (C.A. Appellee App. Tab 1.) The parties selected arbitrators pursuant to NASD Dispute Resolution ("NASD DR") Rule 10308. Respondent submitted its ranking of potential arbitrators within the time allowed by NASD DR rules. (P.C. Supp. App. 56.) Pursuant to NASD DR rules, Petitioner filed a Request for Production of Documents to Respondent on November 25, 2001. (C.A. Appellee App. Tab 5.) Petitioner did not serve the Request for Production of Documents on Respondent until March 4, 2002. (C.A. Appellee App. Tab 6.) Respondent responded to

8. References to the Appendix to the Petition for Writ of Certiorari are cited as "P.C. App. __"; references to the Supplemental Appendix to the Petition for Writ of Certiorari are cited as "P.C. Supp. App. __"; and references to the Appendix filed by Respondent in the First Circuit are cited as "C.A. Appellee App. __."

Petitioner's Request for Production of Documents on April 3, 2002. (C.A. Appellee App. Tab 7.) In its response, Respondent objected to certain requests and produced responsive documents to other requests. *Id.* Respondent served its Request for Production of Documents on Petitioner on November 9, 2001. Petitioner never responded to Respondent's discovery requests and never produced any responsive documents to Respondent. (C.A. Appellee App. Tab 11.)

On April 14, 2002, Petitioner filed a Motion to Amend his Statement of Claim in Arbitration. (C.A. Appellee App. Tab 8.) Respondent objected to the Motion to Amend on April 26, 2002 and argued that the proposed new claims did nothing more than attack counsel and raise discovery issues. (C.A. Appellee App. Tab 9.) A three member arbitration panel (the "Panel") allowed Petitioner's Motion to Amend over Respondent's objections. (C.A. Appellee App. Tab 10.) The Amended Statement of Claim included a claim that Respondent failed to produce documents that Petitioner believed were relevant (and to which Respondent had timely filed objections). (C.A. Appellee App. Tab 11.) The Panel also ordered that the arbitration proceed despite the fact that Petitioner had not produced *any* documents to Respondent in discovery. (C.A. Appellee App. Tab 11.)

During the arbitration, the Panel heard the evidence presented by both parties. The Panel also considered and ruled on evidentiary issues raised by the parties. Following the arbitration hearing, the Panel dismissed Petitioner's claims in their entirety in an Award dated July 18, 2002. (P.C. Supp. App. 61.)

Subsequent to the arbitration, Petitioner obtained copies of tapes of the arbitration proceedings. (The NASD preserves the hearing record on those cassette tapes). Petitioner complained to the NASD that he did not receive all of the tapes (Petitioner received three (3) tapes and claims that four (4) existed) and that some of the contents of the hearing were missing from the tapes. (P.C. Supp. App. 67.) The NASD notified Petitioner on August 14, 2002 that "there were a total of three (3) tapes used to record the hearing on the merits" and that the NASD had provided Petitioner with an "exact" copy of the tapes.[9] (P.C. Supp. App. 62-66.)

Petitioner submitted a Motion to Re-open the case on August 16, 2002. (P.C. Supp. App. 70.) The District Court treated that motion as a Motion for Reconsideration, which it denied on September 6, 2002. (P.C. Supp. App. 88.) Petitioner filed a Motion to Request Vacation of the Arbitration Award ("Motion to Vacate") with the District Court on December 16, 2002. (P.C. Supp. App. 102.) Respondent objected to the Motion to Vacate and filed its own Motion to Confirm the Arbitration Award ("Motion to Confirm") on December 30, 2002. (C.A. Appellee App. Tab 3.) In his Motion to Vacate, Petitioner argued that the arbitration was "extremely unfair." (P.C. Supp. App. 102.) Petitioner complained that the Panel had improperly denied his evidentiary request for certain documents he deemed relevant and to which Respondent had objected. *Id.* Petitioner also complained that the NASD erased portions of the hearing tapes. *Id.* The District Court denied Petitioner's Motion to Vacate and allowed Respondent's Motion to Confirm on February 27, 2003. (P.C. Supp. App. 115.) The District Court did not issue a written opinion.

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9. Respondent has not received copies of the hearing tapes.

The parties filed cross appeals in the First Circuit. In his appeal, Petitioner claimed, among other things, that the NASD had a conflict of interest and was therefore an improper venue for the arbitration; that "arbitration management frauds" resulted from the aforementioned conflict of interest; that the arbitration was "unfair"; that the District Court erred in failing to review evidentiary issues presented to the arbitration panel; that the District Court erred in denying Petitioner's request for additional testimony from NASD employees after the completion of the arbitration and after the Panel had rendered its award; that the District Court erred in refusing to add the NASD as a party to the case; and that the District Court's judgment was racially motivated. (P.C. App. 5-33.) The "arbitration management frauds" Petitioner complained of consisted *solely* of Respondent's alleged failure to submit its rankings of proposed arbitrators within the time required by NASD DR rules and the NASD's alleged tampering with the cassette tapes used to record the arbitration hearing. *Id.*

In its cross-appeal, Respondent contended that the District Court erred in treating Petitioner's Motion to Re-open the case as a Motion to Vacate the arbitration award thereby tolling the three (3) month statutory deadline for filing Motions to Vacate under the Federal Arbitration Act. (P.C. App. 34-60.) The First Circuit affirmed the judgment of the District Court on February 5, 2004. (P.C. App. 151.) The First Circuit did not issue a written opinion.

REASONS FOR DENYING THE PETITION

Petitioner asserts that the arbitration award should have been vacated under § 10(a)(1) of the FAA due to alleged (i) "fraud on violating the rules of the arbitration panel selection"; and alleged (ii) "fraud on modifying arbitration hearing tape." (Pet. at 12.) Under the Federal Arbitration Act, however, a district court may vacate an arbitration award only under very limited circumstances. Statutory grounds for appeal are limited to instances where: (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption among the arbitrators; (3) the arbitrators refused to postpone the hearing or refused to hear pertinent and material evidence; or (4) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award was not made. *See* 9 U.S.C. § 10(a)(1) - (4).[10]

Moreover, in deciding whether to confirm or vacate an arbitration award, Courts must grant the arbitration panel's decision great deference. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (where parties agreed to submit to arbitration, "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.") Granting the appropriate deference to the Panel's decision here, the District Court properly denied Petitioner's motion to vacate and granted Respondent's motion to confirm the arbitration award. Petitioner appealed this decision to the First Circuit, which, after considering the same fraud arguments presented here, affirmed the District Court's judgment. Petitioner now seeks yet another review of those very same fraud arguments.

10. Although some Circuits have recognized additional judicially crafted grounds for challenging an arbitration award, none are applicable here, nor does Petitioner assert that any are.

I. Supreme Court Review of the Questions Presented in the Petition for Writ of Certiorari is Neither Warranted Nor Advisable

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. The questions presented in the Petition for Writ of Certiorari do not warrant review by this Court. Petitioner does not contend that the First Circuit decision is in conflict with the decision of another United States court of appeals; that the First Circuit has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or that the First Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, to call for an exercise of power of this Court. Nor does Petitioner contend that the First Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or that the First Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rather, Petitioner merely seeks to have this Court revisit fraud allegations that previously have been considered and rejected by both the District Court and the First Circuit.[11] Petitioner sets forth no compelling reason for this Court to reconsider those allegations.

Moreover, the broad federal policy favoring the finality of arbitration awards counsels against granting certiorari in this case. The Congressional purpose of enacting the Federal Arbitration Act was to encourage speedy and final resolution

11. Respondent addresses Petitioner's assertion that the First Circuit denied his First Amendment right to free speech by failing to conduct a hearing in Section III below.

of arbitration disputes as an expeditious alternative to protracted litigation. That purpose is seriously undermined when claimants such as Petitioner are permitted to subject respondents to an endless series of appeals.

This matter has been pending for over four years. Following the arbitration hearing, a three member arbitration panel entered the arbitration award at issue. Both the District Court and the First Circuit have since rejected Petitioner's assertion that the arbitration award should be vacated due to fraud in selection of the arbitration panel and the alleged modification of the arbitration hearing tapes. In view of the broad federal policy favoring prompt resolution of disputes, **finality** of arbitration, and limited judicial intervention into arbitration, Petitioner's assertion that the arbitration award should have been vacated pursuant to § 10(a)(1) of the Federal Arbitration Act does not warrant this Court's review. *See Fradella v. Petricca*, 183 F.3d 17, 20 (1st Cir. 1999) (recognizing that legislative goal of FAA is to promote "the expeditious and final resolution of arbitral claims"); *see also Wilko v. Swan et al.*, 346 U.S. 427, 431 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) ("The reports of both Houses on [United States Arbitration] Act stress the need for avoiding the delay and expense of litigation.").

II. The First Circuit Did Not Err in Affirming the District Court's Judgment Confirming the Arbitration Award

Petitioner offers only two bases for vacatur of the arbitration award under 9 U.S.C. § 10(a): "fraud on violating the rules of the arbitration panel selection" and "fraud on modifying arbitration hearing tape."[12] Petitioner cannot demonstrate by clear and convincing evidence that the arbitration award was procured by fraud, nor can he demonstrate that the purported fraud materially related to an issue in arbitration.

A. As the District Court correctly held, Petitioner cannot demonstrate by clear and convincing evidence that the arbitration award was procured by fraud

The Circuit courts that have construed 9 U.S.C. § 10(a)(1) have uniformly held that in order to vacate an arbitration award on the ground that it was procured by fraud, the alleged fraud must be established by clear and convincing evidence. *See, e.g., Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) (movant must establish fraud by clear and convincing evidence) (citations omitted); *LaFarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986) ("appellant must establish the fraud by clear and convincing evidence") (citing *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982), *cert. den.*, 459 U.S. 990 (1982)

12. The Petition for Writ of Certiorari also erroneously asserts that "Plaintiff successfully proved that the Defendant Hire Lawyers to Lie and Perjury in Affidavit." This assertion is wholly without merit. Moreover, Petitioner offers no facts or law in support of this assertion that would warrant the Court's consideration.

("In order to protect the finality of arbitration decisions, courts must be slow to vacate an arbitral award on the grounds of fraud. . . . The fraud must be established by clear and convincing evidence.")).

The District Court correctly denied Petitioner's motion to vacate the arbitration award. Petitioner cannot demonstrate either "fraud on violating the rules of the arbitration panel selection" or "fraud on modifying arbitration hearing tape" by clear and convincing evidence. Although not articulated in the Petition for Writ of Certiorari, on appeal to the First Circuit Petitioner claimed that Respondent failed to provide the NASD with its rankings of proposed arbitrators within the time allowed by NASD DR rules. Petitioner also takes issue with the appointment of arbitrators to the Panel who were not included on the original list of proposed arbitrators circulated to the parties by the NASD DR. The record, however, clearly supports the fact that the arbitration panel was selected in conformance with the rules of the NASD DR. The only evidence before the First Circuit (and the District Court) with respect to this issue was a March 26, 2002 letter from the Associate Vice President and Regional Director of the NASD DR to Petitioner. In that letter, Petitioner was informed:

* * *

> On December 4, 2001, we notified you that your case was ready for the appointment of arbitrators under our Neutral List Selection System (NLSS). Rule 10308 of the Code of Arbitration Procedure (the "Code") provides that NASD Dispute Resolution (NASD DR) gives each party a list of arbitrators. The parties must strike through or

> cross out, and rank the arbitrators on the list and return the list to us within twenty days after the lists are sent to the parties. . . . If a party's list is not received on time, the party is deemed to have accepted all arbitrators on the list. Pursuant to Rule 10308(c)(4)(B) of the Code, the Director has the authority in certain circumstances to appoint an arbitrator not on the list to fill a Panel.
>
> * * *
>
> Your arbitrator ranking form was sent to us by US Mail and received in our office on December 20, 2001. Respondent's (T.D. Waterhouse Investor Services, Inc.) ranking form was sent to us by facsimile and received in our office on December 11, 2001, with an original copy arriving on December 12, 2001. I enclose for your review a copy of the date stamped cover letter that accompanied Respondent's ranking form. Both parties responses were received before the deadline of December 24, 2001. We used both parties lists to create a consolidated list. The Director used his authority to extend the list to complete the panel because all of the industry arbitrators were struck by you and the Respondent.
>
> * * *

(P.C. Supp. App. 56.)

Petitioner also alleges that there were four (4) hearing tapes that recorded the arbitration proceedings, but that the NASD only provided him with three tapes. Petitioner contends that the NASD "'cooked' (editing and modifying)" those tapes. The only evidence before the First Circuit (and the District Court) with respect to this issue indisputably demonstrates that Petitioner received an "exact" copy of the tapes of the arbitration proceedings. The record included email correspondence between the NASD and Petitioner from August 10, 2002 through August 26, 2002. In the correspondence, an NASD employee states on behalf of the NASD:

> I have confirmed with the Panel that there were a total of three (3) tapes used to record the hearing on the merits during the one day hearing. The tapes that I sent to you were a [sic] "exact" recoding of the tapes that I received back from the panel.
>
> * * *
>
> The panel has confirmed that the entire hearing was tape recorded, except for executive sessions, which are not recorded. The Panel also said that they stopped the recorder when you stated that you would like to take a break.
>
> * * *

(P.C. Supp. App. 62-66.)

The First Circuit correctly affirmed the District Court's order confirming the arbitration award because Petitioner did not demonstrate by clear and convincing evidence that there was any fraud in connection with either the selection of the arbitration panel or the recording of the arbitration hearing.

B. As the District Court correctly held, Petitioner cannot demonstrate that the purported frauds materially relate to an issue in arbitration

The Circuit Courts are also uniform in holding that before a motion to vacate will be allowed, the movant must demonstrate that the fraud materially related to an issue in arbitration. *See, e.g., LaFarge Conseils Et Etudes*, 791 F.2d at 1339 ("appellant must establish the fraud was materially related to an issue in the arbitration") (citing *Dogherra*, 679 F.2d at 1297 (the fraud must materially relate to an issue in the arbitration); *Bonar*, 835 F.2d at 1383 (person seeking to vacate award must demonstrate that fraud materially related to issue in arbitration); *Forsythe Int'l S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1995) (9 U.S.C. § 10 does not require vacatur in the event of all fraudulent conduct but only where there is a nexus between the fraud and the basis for arbitration panel's decision; where the panel hears allegation of fraud and then rests its decision on grounds clearly independent of issues connected to the fraud, the basis for vacatur is absent).

Neither the purported fraud in selecting the arbitration panel, nor the purported fraud in the recording of the arbitration proceeding, materially related to an issue in the arbitration. The underlying causes of action for "trade mistake" asserted by Petitioner in arbitration involved allegations that Respondent failed to execute a trade of 5000

shares of Peritus Software Services, Inc. Both of the purported "frauds" of which Petitioner complains are procedural in nature and do not relate to any of the issues raised by Petitioner in his Statement of Claim or Amended Statement of Claim. *See, e.g., LaFarge Conseils Et Etudes*, 791 F.2d at 1339. The purported "fraud on violating the rules of the arbitration panel selection" relates to the composition of the arbitration panel that was empanelled prior to the arbitration. The purported "fraud on modifying arbitration hearing tape" relates to conduct that allegedly took place after the arbitration. Petitioner has not and cannot credibly argue that Respondent acted fraudulently with respect to any material issue raised by him during the arbitration proceedings.

III. The First Circuit Did Not Violate Petitioner's First Amendment Rights by Affirming the District Court's Judgment Without First Holding a Hearing

Petitioner also asserts, without citation to any authority, that the First Circuit violated his First Amendment right to free speech by denying his appeal without first holding a hearing. The Federal Rules of Appellate Procedure for the First Circuit do not require the First Circuit to hold a hearing prior to ruling on an appeal.

> Oral argument must be allowed in every case *unless* a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or

> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed. R. App. P. 34(a)(2) (emphasis added).

Here, in response to Petitioner's request for oral argument, the First Circuit issued a notice informing Petitioner that:

> In accordance with Rule 34 of the Federal Rules of Appellate Procedure, as amended effective December 1, 1993, this is to advise you that the three judges of a panel, after examination of the briefs and record, are unanimously of the opinion that oral argument is not needed in this case.

De Shen v. T.D. Waterhouse Investor Services, Inc., Notice of Denial of Request for Oral Argument, No. 03-1478, (1st Cir. Sept. 30, 2003).

The First Circuit did not violate Petitioner's First Amendment rights ruling on his appeal without holding a hearing, and certiorari is not warranted with respect to this issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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